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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES LOUIS PICKERING, Defendant and Appellant.	B198754 (Los Angeles County Superior Ct. No. YA065093)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lori Ann Fournier and Eric C. Taylor, Judges. Affirmed.

Catherine Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Joseph P. Lee and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant James Louis Pickering appeals from the judgment entered following a jury trial in which he was convicted of four counts of possession of an assault weapon in violation of Penal Code section 12280, subdivision (b).[1] Appellant contends application of the Assault Weapons Control Act to him violated the ex post facto clauses of the state and federal Constitutions and the warrantless search of his home violated the Fourth Amendment because his consent was involuntarily given. We affirm.

FACTS

Late on July 4, 2005,[2] appellant and his son, J., approached celebrating neighbors who had been exploding fireworks. Appellant carried a loaded MAK 90 semiautomatic assault rifle, and J. carried a loaded 12-gauge shotgun. Appellant pointed his rifle at the crowd, which quickly dispersed. Richard Pearce and other men in the crowd took the guns away from appellant and J. and beat them when they resisted. Pearce put the shotgun in his truck and left with his family. When sheriff's deputies arrived, they seized the MAK 90 and obtained appellant's verbal and written consent to search his house. In the house they found 23 other guns, including a Sturm Ruger Mini 14 semiautomatic assault rifle, an SKS assault rifle, and an AA Arms AP-9 semiautomatic assault pistol.

The jury convicted appellant of four counts of possession of an assault weapon, but could not reach a verdict on two counts of assault with an assault weapon (§ 245, subd. (a)(3)). The court declared a mistrial with respect to the assault charges and dismissed them. The court placed appellant on summary probation on conditions including a jail term equal to time served.

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1 Unless otherwise noted, all further statutory references pertain to the Penal Code.

2 Unless otherwise noted, all further date references pertain to 2005.

DISCUSSION

1. Claimed ex post facto violation

The Assault Weapons Control Act (AWCA) restricts the possession of assault weapons, as defined by sections 12276, 12276.1, and 12276.5, and requires registration of assault weapons owned prior to the effective date of the AWCA. (§§ 12280-12287.) With specified exceptions, the AWCA prohibits the possession of unregistered assault weapons.

The AWCA required assault weapons listed in section 12276 to be registered by January 1, 1991. Section 12276.1, which broadens the definition of "assault weapon" through the specification of features, became effective on January 1, 2000. (§ 12276.1, subd. (e).) Appellant testified, outside the presence of the jury, that he purchased the MAK 90 in 1991, the Sturm Ruger Mini 14 and SKS in 1992, and the AA Arms AP-9 in 1993.

Appellant contends the ban on possession of unregistered, legally-purchased assault weapons violates the ex post facto clause of the state and federal Constitutions. He argues his "offense did not even exist when he purchased his weapons and his continued possession therefore never became unlawful."

The ex post facto clause of the federal Constitution prohibits, *inter alia*, legislation that punishes as a crime an act that was innocent when it was committed. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42, 110 S.Ct. 2715.) California's ex post facto clause is interpreted identically. (*People v. McVickers* (1992) 4 Cal.4th 81, 84.)

The applicability of ex post facto principles thus turns upon whether requiring an owner of assault weapons to register them constitutes punishment. The test is "whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment

despite the Legislature's contrary intent." (*People v. Castellanos* (1999) 21 Cal.4th 785, 795 (*Castellanos*).)

In enacting the AWCA, the Legislature declared its intent in section 12275.5, subdivision (a): "The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings. It is the intent of the Legislature in enacting this chapter to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession. It is not, however, the intent of the Legislature by this chapter to place restrictions on the use of those weapons which are primarily designed and intended for hunting, target practice, or other legitimate sports or recreational activities." The assault weapon registration requirement is thus regulatory and remedial. Registration and licensing serve the purpose of providing law enforcement agencies with information regarding the ownership and likely location of assault weapons, which serves the state interest in protecting law enforcement officers and the public from the "threat to the health, safety, and security" posed by weapons with "such a high rate of fire and capacity for firepower."

Nor is the nature or effect of the registration requirement so punitive that it must be considered punishment. Although registration imposes a burden upon an owner of assault weapons, the burden is slight and does not rise to the level of punishment. Moreover, the burden is "no more onerous than necessary to achieve the purpose of the statute." (*Castellanos*, *supra*, 21 Cal.4th at p. 796.) The act does not oblige owners of legally-acquired assault weapons to relinquish their guns, but merely requires them to register their ownership. Accordingly, the registration requirement does not constitute punishment.

Moreover, the act operates only prospectively. It does not criminalize the acquisition or possession of assault weapons during the period prior to the registration deadline set forth in section 12285, subdivision (a)(1). It simply required persons who owned such weapons to register them by a certain date. Mandating registration of already-owned assault weapons does not punish as a crime an act that was innocent when it was committed and therefore is not an ex post facto law. At the heart of appellant's contention lies an implicit claim that he had no duty to comply with the registration requirement in the AWCA. He is wrong. "No one can acquire a vested right to continue in possession of that which is a menace to the public safety." (*People v. McCloskey* (1926) 76 Cal.App. 227, 230 [no ex post facto violation in convicting defendant of possession of a firearm by a felon, even though such possession was not prohibited at time defendant acquired the gun]; see also *Samuels v. McCurdy* (1925) 267 U.S. 188, 193, 45 S.Ct. 264 ["This law is not an ex post facto law. It does not provide a punishment for a past offense. It does not fix a penalty for the owner for having become possessed of the liquor. The penalty it imposes is for continuing to possess the liquor after the enactment of the law."] The registration requirement was a proper exercise of police power and did not violate ex post facto principles.[3]

2. Fourth Amendment claim

Appellant sought to suppress all evidence seized from his home on the ground his consent was not knowing, intelligent, and voluntary.

At the hearing on the suppression motion, Los Angeles County Sheriff's Deputy Christopher Maurizi testified that when he arrived at the scene, paramedics were treating

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3 We further note appellant's SKS (count 5) fell within the scope of section 12276, subdivision (a)(11) as originally enacted, and would thus have been subject to the registration requirement at the time he purchased it in 1992. He therefore cannot plausibly assert an ex post facto argument with respect to the SKS.

appellant, who was sitting on a sidewalk or driveway. Other sheriff's deputies were near appellant. Appellant appeared disheveled and was bleeding from his nose and mouth. It appeared he had been assaulted. Maurizi asked appellant his name and address, and appellant answered. Appellant smelled of alcohol and slurred his words slightly. He did not appear to be grossly intoxicated, however. He appeared to be "alert to a degree." His answers to Maurizi's questions were responsive and rational, and he appeared to be using "some kind of a thought process to answer [Maurizi's] questions."

Maurizi asked appellant whether there were any other unsecured weapons the deputies needed to know about. Appellant said yes. Maurizi asked him where they were. Appellant said they were inside his house. After further questioning, appellant told Maurizi they were in unsecured gun lockers. Maurizi said something to appellant about his potential liability if the weapons fell into the hands of minors. Maurizi asked appellant for permission to go into the house to secure those weapons. Appellant said yes, Maurizi could do so. Maurizi showed appellant a consent to search form and explained the form to him line by line. Maurizi told appellant the deputies' purpose was "to locate the additional weapon stated by witnesses that were involved in the incident and to secure any additional unsecured weapons." Deputy Dritsopoulous filled out the form, and appellant signed, dated, and wrote the time on it. Maurizi spent about five minutes with appellant before appellant signed the consent form.

After appellant signed the consent form, Maurizi and other deputies entered appellant's house. At the time, Maurizi thought the other gun reportedly used in the assaults might have been inside the house, as he did not know whether appellant or his son had gone back into the house.

Deputy Derek White watched appellant interact with the paramedics who treated him at the scene. Appellant seemed to be alert and aware. He answered the paramedics' questions without delay. White rode to the hospital with appellant in an ambulance. Appellant seemed intoxicated, but White saw no objective signs that appellant was disoriented or unaware of what was happening. At the hospital, appellant asked White

questions about J. He asked if J. was okay, whether J. had been arrested, and whether White would contact the deputy at the scene to allow appellant to talk to J. Appellant seemed alert and oriented. Appellant asked White what he and his partner would have done if someone had thrown fireworks on their patio. After White and appellant discussed that matter, medical personnel came to ask appellant questions. He answered them without delay and appeared "coherent to the situation, alert." At all times appellant seemed alert and oriented when speaking to the medical personnel. White began filling out the "booking packet" at the hospital, which entailed getting certain information about appellant, such as his name, date of birth, height, weight, phone number, and emergency contact information.

Dr. Josef Amin treated appellant at the emergency room. Appellant had lost a tooth, and had a scalp hematoma, bruises, abrasions, and a cut over his eyebrow that required three stitches. He was "obviously intoxicated, although alert and responsive" to questioning. Amin explained that appellant smelled of alcohol and "was slurring his words just slightly." Appellant "seemed to understand what was going on" around him, and nothing he said or did suggested to Amin that he did not understand. Amin asked appellant what happened, and he replied he did not remember, which indicated he may have lost consciousness. Amin ordered a CT scan of appellant's brain, which showed no intracranial injury. Appellant told hospital personnel he was taking Lotensin (an antihypertensive medication) and diabetic medications Glucophage and Glucutrol.

Psychiatrist Samuel Miles testified he interviewed appellant twice. Appellant told Miles he was taking Xanax, Neurontin, and Restoril on a daily basis as of July 4. Appellant said he consumed at least a fifth or a quart of alcohol per day and may have consumed more on July 4. Miles reviewed appellant's prescription records, which were consistent with taking regular amounts of Xanax and Neurontin. These were depressants and had an additive or multiplicative effect when consumed with alcohol. Miles also determined that appellant was an alcoholic and a diabetic. He testified that "alcohol wrecks [*sic*] havoc with control of diabetes," and diabetes can impair brain functioning,

with the most complex cognitive functioning eliminated first. Being alert and responsive to questioning about biographical data such as name and date of birth requires only lower functionality. Miles opined that the effects of the alcohol, prescription medication, and head trauma resulting in unconsciousness would probably prevent appellant from engaging in higher cognitive functioning sufficient to understand giving consent for a search of his house. However, Miles cited his erroneous belief that appellant had been unable to sign consent forms at the hospital as part of the basis for his opinion. In fact, appellant signed at least one consent form and his discharge papers at the hospital. Miles also admitted that impairment of appellant's higher cognitive functioning may not have been obvious to other people.

Appellant's son J. testified his father consumed five or six Corona Light beers over five or six hours at a neighbor's barbeque. They had only been home for two or three minutes before they went outside with guns. After the neighbors beat them, J. found his father lying face down and unconscious in a "pool of blood." J. tried to get a response from his father for about two minutes before the paramedics arrived and revived his father.

Appellant contends the trial court erred by denying his suppression motion. He argues his consent was involuntary because he was "incapable of giving consent" due to the combined effect of intoxication, medication, and head trauma; the officers did not ask for his consent but instead told him they were going to search; and the officers told him they were going into his house to secure the guns to protect him from civil liability.

A warrantless search is presumed to be illegal. (*Mincey v. Arizona* (1978) 437 U.S. 385, 390, 98 S.Ct. 2408.) The prosecution always has the burden of justifying a warrantless search or seizure by proving that it fell within a recognized exception to the warrant requirement. (*People v. Williams* (1999) 20 Cal.4th 119, 130; *People v. James* (1977) 19 Cal.3d 99, 106 (*James*).)

In ruling upon a motion to suppress, the trial court judges the credibility of the witnesses, resolves any conflicts in the testimony, weighs the evidence, and draws factual

inferences. We will uphold the trial court's findings, express or implied, on such matters if they are supported by substantial evidence, but we independently review whether the search or seizure was reasonable under the Fourth Amendment. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182.)

Neither a warrant nor probable cause is required for a search conducted pursuant to consent. (*People v. Woods* (1999) 21 Cal.4th 668, 674.) The prosecution bears the burden of establishing that the consent upon which a search is based was voluntarily given, i.e., a product of the individual's free will rather than a mere submission to an express or implied assertion of authority. (*James, supra*, 19 Cal.3d at p. 106.) The voluntariness of consent is a question of fact to be determined in light of the totality of circumstances. (*Ibid*.) Accordingly, all presumptions favor the proper exercise of the trial court's power to judge the credibility of witnesses, resolve conflicts, weigh evidence, and draw factual inferences. (*Id*. at p. 107.)

a. Mental impairment

Impairment of the defendant's mental faculties should be considered, along with all other circumstances, in assessing the voluntariness of the consent. (*James, supra,* 19 Cal.3d at p. 116, fn. 14.) However, a defendant who is under the influence of alcohol or drugs may nonetheless give voluntary consent. (*People v. Garcia* (1964) 227 Cal.App.2d 345, 350-351; *People v. Frye* (1998) 18 Cal.4th 894, 988 [consumption of alcohol insufficient to establish impaired capacity to waive right to counsel under *Miranda v. Arizona* (1966) 384 U.S. 436, 444, 86 S.Ct. 1602].) "[A]n objective standard should be used in determining whether there has been a valid consent to search, even when that consent emanates from an accused who later establishes, upon facts not readily apparent to the officers, that he was not in full possession of his faculties at the time. This conclusion is supported by the fact that if the invalidity of the consent can only be established later, it is then generally too late to secure a search warrant or take such other

steps as might have been taken to secure and seize the contraband, loot or evidence, had consent been refused." (*People v. Gurley* (1972) 23 Cal.App.3d 536, 555.)

We conclude substantial evidence supports the trial court's implicit finding that appellant's consent was knowing, voluntary, and intelligent despite his intoxication, alleged consumption of medication, and head trauma. Appellant suffered only superficial injuries to his head. Despite the claimed loss of consciousness during, or in the immediate wake of, the beating, appellant was conscious and appeared to the officers and Dr. Amin to understand what was going on and everything that was asked of him. Deputies Maurizi and White and Dr. Amin found appellant alert and able to understand and respond in a timely and appropriate manner to their questions and those of the paramedics and hospital personnel. Appellant signed several consent forms including the search consent, asked appropriate questions about his son's status and well-being, and even formulated a plan to speak with his son through their respective custodians. J.'s testimony supported a conclusion appellant exaggerated his alcohol consumption when speaking with Dr. Miles. Because Miles based his testimony upon appellant's self-reporting, it was necessarily subject to suspicion. The trial court was free to disregard it and conclude, based upon the remaining testimony and signed consent form, that appellant reasonably appeared to Maurizi to be in sufficient possession of his mental faculties to knowingly, intelligently, and voluntarily consent to a search of his home.

b. Failure to advise of right to refuse consent

The police need not tell the defendant that he or she can refuse to consent to a search because merely asking permission to enter and search implies the possibility of withholding permission. (*James*, *supra*, 19 Cal.3d at pp. 115-118.)

Appellant argues "the officer never asked if consent was given. … Instead, he simply told Pickering he was going to his home to search and secure weapons and then presented him with a paper to sign." The record does not support this characterization,

however. Maurizi testified he asked appellant for permission to go into the house to secure the guns. After appellant said Maurizi could do so, Maurizi went through the consent to search form with appellant, explaining it line by line. Appellant signed and dated the form. This constitutes substantial evidence supporting the trial court's implicit conclusion Maurizi asked permission to enter and search, which implied the possibility of withholding consent.

c. Misrepresentation by police

Consent to search may be valid even if police deceived the defendant regarding the purpose of the search. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1578.) Any deception must be assessed with reference to the surrounding circumstances. (*Ibid.*)

Appellant argues the officers deceived him by telling him they were simply "going into his house to secure the guns" and to look for the "missing rifle" in order to protect him from potential liability. This argument is based upon a highly selective view of the record. Maurizi testified appellant told him there were additional guns in unsecured lockers inside the house. On cross-examination, Maurizi admitted he said something to appellant about his potential liability if the weapons fell into the hands of minors. The consent form appellant signed stated he granted "full and unconditional authority to the Los Angeles County Sheriff's Department to enter those premises to conduct a search for rifles and additional weapons and to conduct any related investigation in any related criminal or non-criminal law enforcement matter."

Substantial evidence supports the trial court's implicit conclusion that police "misrepresentation" did not render appellant's consent involuntary. Nothing indicates Maurizi or any other deputy misrepresented who they were when speaking with appellant. In any event, the consent form clearly specified that appellant was consenting to a search by the sheriff's department. Maurizi's reference to appellant's potential liability in the event children obtained access to his unsecured guns was a true statement

that in no way limited or negated the other true statements on the consent form appellant signed. Viewed in the worst possible light, Maurizi used the statement regarding liability to help persuade appellant to consent to the search. The statement did not, however, amount to deception regarding the rights he was surrendering or the deputies' intent. Moreover, the consent form fully apprised appellant of the deputies' intent to search for "rifles and additional weapons" and to investigate. Appellant's misrepresentation claim has no merit.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

BAUER, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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* Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.